NO. 21172

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN HARVEY RICE, LAWRENCE SANFORD TOROKER, EDDIE JAVOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
JO ANN DUNNE,
Assistant U. S. Attorney,
Chief, Fraud Section,
Criminal Division,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

NO. 21172

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN HARVEY RICE, LAWRENCE SANFORD TOROKER, EDDIE JAVOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
JO ANN DUNNE,
Assistant U. S. Attorney,
Chief, Fraud Section,
Criminal Division,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

Rules

Text

NO. 21172

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN HARVEY RICE, LAWRENCE SANFORD TOROKER, EDDIE JAVOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION

On June 16, 1965 the Federal Grand Jury for the Southern District of California, Central Division, returned a Thirteen Count Indictment alleging violations of Title 21, United States Code, Section 174 and Title 21, United States Code, Section 176(a). The offenses described in the Indictment concerned heroin, cocaine and marihuana. Appellant Alan Harvey Rice was charged in all Counts of the Indictment. Appellant Lawrence Sanford Toroker was charged in nine counts of the Indictment, that is all counts except

Counts Three, Four, Six and Seven. Appellant Eddie Javor was charged in Counts Ten and Eleven of the Indictment. The defendant Michael Anthony DeCristo was charged in the first Four Counts of the Indictment [C. T. 2-14]. 1/

After arraignment and plea of not guilty to all counts, a jury trial was commenced on November 9, 1965, the Honorable Jesse W. Curtis, United States District Court Judge, presiding. The defendant, Michael Anthony DeCristo, having failed to appear, his bond was ordered forfeited and a Bench Warrant issued [C. T. 19]. On November 9, 1965 the Government moved to dismiss Counts Six and Seven of the Indictment which pertained solely to Appellant Alan Rice and the court so ordered [C. T. 19].

On November 23, 1965 the jury returned a verdict finding each Appellant guilty as to all counts for which they charged [C. T. 27].

On December 17, 1965 Appellant Eddie Javor was judged guilty as charged and sentenced by the Honorable Jesse W. Curtis to 7 years imprisonment on each of Counts Ten and Eleven to commence and run concurrently [C. T. 56]. On December 21, 1965 Appellant Eddie Javor filed a timely Notice of Appeal in the United States District Court for the Southern District of California appealing the judgment of conviction [C. T. 57].

On January 3, 1966 Appellant Alan Harvey Rice was adjudged guilty as charged and sentenced by the Honorable Jesse W. Curtis

---

1/ C. T. refers to Clerk's Transcript.

to the maximum period provided by law and for a study as described in Title 18, United States Code, Section 4208(c). On May 16, 1966 the court having received and considered the report of such study, Appellant's sentence was reduced to 5 years on each of Counts One, Two, Three, Four, Five, Eight, Nine, Ten, Eleven, Twelve and Thirteen of the Indictment to commence and run concurrently [C. T. 76, 80].

On May 20, 1966 Appellant Alan Harvey Rice filed a timely Notice of Appeal in the United States District Court of the Southern District of California, appealing the judgment of conviction [C. T. 81].

On January 3, 1966 Appellant Lawrence Sanford Toroker was adjudged guilty as charged and sentenced by the Honorable Jesse W. Curtis to the maximum period as provided by law and for a study as described in Title 18, United States Code, Section 4208(c). On May 16, 1966 the Court having received and considered the report of such study, the Appellant was sentenced for a period of 5 years on each of Counts One, Two, Five, Eight, Nine, Ten, Eleven, Twelve and Thirteen to commence and run concurrently [C. T. 77, 79].

On May 20, 1966 Appellant Lawrence Sanford Toroker filed a timely Notice of Appeal in the United States District Court, Southern District of California, appealing the judgment of conviction [C. T. 82].

The defendant Michael Anthony DeCristo having been subsequently apprehended entered a plea of guilty to Counts Two

and Four of the Indictment and on January 3, 1966 was sentenced to a period of 5 years on each count to begin and run concurrently. On motion of the United States Attorney, the court ordered Counts One and Three dismissed [C. T. 78]. The defendant Michael Anthony DeCristo is not appealing his judgment of conviction.

II

STATUTES INVOLVED

Count Eight of the Indictment was brought under Title 21, United States Code, Section 176(a) which provides in pertinent part as follows:

> "Whoever fraudulently or knowingly . . . receives, conceals . . . or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought into the United States, contrary to law . . . shall be imprisoned not less than 5 or more than 20 years and, in addition, they be fined not more than $20,000.
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotics drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. . . ."

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231 and Title 21, United States Code, Sections 174 and 176(a). Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294.

III

STATEMENT OF FACTS

On May 18, 1965 Federal Narcotics Agent Richard Salmi, acting in an undercover capacity, was introduced to Appellant Lawrence Toroker at the residence of Appellants Rice and Toroker. During their ensuing conversation, Agent Salmi inquired about the availability of an ounce of heroin. Appellant Toroker advised that he was expecting delivery of an ounce of heroin and requested the Agent to remain [R. T. 83, 85]. Appellant Toroker stated the price would be $500.00 for an ounce of good quality heroin [R. T. 86]. After a period of time, Agent Salmi departed and made arrangements to contact Toroker at a later date [R. T. 88].

Agent Salmi returned the following evening and Mr. Toroker introduced Michael DeCristo [R. T. 90]. After placing a phone call, Mr. Toroker advised that he had been unable to determine when the heroin would be delivered. During this meeting Mr. Toroker introduced the subject of cocaine, inquiring if Agent Salmi would be interested in purchasing cocaine. Mr. Toroker stated

---

2/ R. T. refers to Reporter's Transcript.

that he had access to ample quantities of cocaine and had recently sold ten ounces of cocaine. He further stated that his sole support was derived from the sale of narcotics and LSD (lysergic acid diethylamide) [R. T. 91-93]. As Agent Salmi was leaving, Mr. Toroker asked for a telephone number where he could contact Agent Salmi.

After a telephone conversation with Mr. Toroker wherein he advised that he was in possession of the ounce of heroin which he would sell for $500.00, the Agent returned to the residence on May 21, 1965, and purchased one ounce of heroin from Mr. Toroker in the presence of Mr. DeCristo for the sum of $500.00 [R. T. 95, 97, 99] (Counts One and Two of the Indictment). During this meeting, Mr. Toroker advised that he and Mr. DeCristo would soon leave for New York to deliver 8 to 10 ounces of heroin, and the Agent should contact Appellant Alan Rice for further narcotics purchases [R. T. 100]. As Agent Salmi was leaving the residence, Appellant Rice met them and asked Agent Salmi if everything was alright [R. T. 100].

On May 23, 1965 Agent Salmi received two phone calls from Appellant Toroker relative to cocaine. He quoted a sales price of less than $1000.00 an ounce. Appellant Toroker also stated that if the Agent had any interest in purchasing up to 5 ounces of heroin, he should call Appellant Rice [R. T. 102-103].

On May 24, 1965 the Agent called the residence and spoke to Appellant Rice. Appellant Rice stated that he had a package for the Agent of "one coke and 3 of the other" and that he should come

over that evening to purchase. The Agent was unavailable that evening, but agreed to come at another time [R. T. 103-105].

On May 25, 1965 Agent Salmi accompanied by Federal Narcotics Agent Sherman, acting in an undercover capacity, went to the residence. Appellant Rice greeted them and took them into the downstairs den. Michael DeCristo joined them and the Agent purchased the 85.360 grams of heroin described in Counts Three and Four of the Indictment for a total sum of $1,090.00 [R. T. 112]. During the negotiations Appellant Rice stated that an ounce would be a true ounce, that is 28 grams, and the sales price would be $450.00 an ounce. Mr. DeCristo agreed to let the agents have an additional quantity of heroin for $195.00 in compensation for the poor quality of the heroin purchased on May 21. Mr. Rice advised that he would soon be in a position to sell heroin in kilogram quantities and also that he could supply cocaine for a price of much less than $1,000.00 an ounce. Mr. Rice offered to furnish a 2-gram sample of the cocaine which would be representative of the quality of cocaine available for sale [R. T. 110-115, 242-246].

On May 26, 1965 Agent Sherman returned to the residence for the purpose of receiving the cocaine sample. Appellants Toroker and Rice took the Agent into a bedroom. Appellant Rice took a small metal wrapped package from a drawer. Inside the drawer, the Agent also observed three condoms approximately one-third full of powder. Appellants advised that this was cocaine. Appellants advised they wanted $600.00 an ounce for cocaine, that the cocaine came from Mexico just as the heroin did. Agent

Sherman received his .350 gram sample of cocaine and departed [R. T. 249-252] (Count Five of the Indictment).

On June 2, 1965 Agents Sherman and Salmi returned to the residence where they met Appellants Toroker and Rice. In the downstairs den Appellant Rice produced Exhibit 11 which was a price list for heroin. The price list showed that European White Heroin could be purchased for $17,500.00 a kilogram; that a kilogram of European Heroin measured 18 spoons per ounce or 648 spoons per kilogram. The European White Heroin would be delivered through Mexico. A kilogram of Mexican Brown Heroin would consist of a 35 ounce weight of 12 spoons per ounce or 420 spoons per kilogram, at a sales price of $14,300.00 per kilogram. It was agreed that the Agents would purchase a kilogram of European White Heroin [R. T. 126-129]. The Agents returned to the upper portion of the house where Appellant Toroker was seated rolling marihuana cigarettes. Appellant Toroker joined them and in his palm were 15 to 20 cigarettes which he offered to the agents; each Agent took 3 marihuana cigarettes [R. T. 138-255] (Count Eight of the Indictment).

On June 4, 1965, Agent Salmi met Appellant Rice at the Continental Hotel. During this meeting, Appellant Rice advised that his "source of supply" would not deliver the entire kilogram of heroin in one transaction. Rather, the first delivery would be 10 ounces of heroin and the balance to be delivered subsequently [R. T. 143].

On June 5, 1965 in a telephone conversation, Appellant Rice

advised Agent Salmi that the kilogram of heroin would be delivered in Los Angeles shortly and that the "source of supply" would deliver a sample of the heroin that night. In an evening phone conversation on the same date, Appellant Rice stated the "source of supply" would be delivering the sample heroin within the hour [R. T. 178-179]. Agent Salmi then drove to the residence. When he arrived, Appellant Eddie Javor's automobile was parked in the car port [R. T. 179, 517-518]. Inside the residence Appellant Rice would not allow Agent Salmi to enter the downstairs den. Shortly Agent Salmi heard Appellant Javor's automobile drive away, and Appellant Rice then invited the Agent into the downstairs den. Appellant Toroker entered the den from outside the house, carrying 2 rubber condoms containing powder [R. T. 180-182]. Appellant Toroker explained that 1 condom contained an ounce of Mexican Brown Heroin and the other contained an ounce of European White Heroin. Agent Salmi was given a sample from each of the condoms (Count Nine of the Indictment). It was agreed that the two ounces could constitute part of the kilogram sale. The first installment of heroin was soon to arrive in Los Angeles [R. T. 185-186].

Between 10 P. M. and midnight on June 5, Appellant Javor and his girlfriend met John Anthony Cagle in Los Angeles [R. T. 150]. They drove from Los Angeles to La Sierra Motel in Tijuana. Eddie Javor did not register with Customs when he departed the country. Although he was aware of the requirements and had registered in the past [R. T. 1222-1223, 1228]. Mr. Cagle registered as John T. Dexter [R. T. 155-166]. The following evening in

Mr. Cagle's motel room, Appellant Javor gave him a brown paper bag containing 2 prophylactics. In each of the 2 prophylactics were 4 separate condoms containing narcotics [R. T. 157-158].

When they left Tijuana, Mr. Cagle carried the bag of narcotics on his person. They arrived in Los Angeles between 5 and 6 A. M. on June 7 [R. T. 158-159]. Mr. Cagle returned the brown paper bag of narcotics to Appellant Javor [R. T. 159]. At 9:30 A. M. on June 7, Appellant Rice telephoned Agent Salmi. Appellant Rice stated he had just received the narcotics [R. T. 187]. At approximately 4:30 P. M. on June 7, Agents Salmi and Sherman returned to the residence where Appellant Rice gave them a brown paper bag containing 2 rubber condoms. In each condom was 4 smaller condoms of heroin [R. T. 190-261]. Appellant Toroker brought in the 2 other condoms from which Agent Salmi had received samples on his prior visit [R. T. 192] (Counts Ten and Eleven of the Indictment). Utilizing a Marquis Reagent the Agents tested the heroin and received a positive result, indicating the presence of an opiate [R. T. 193]. While this was transpiring, Appellant Rice asked for $7500.00 for the 10 ounces. Rice stated he would give the purchase price to his "source" who would pick up the balance of the kilogram in Tijuana [R. T. 259]. The Agents then arrested Appellants Rice and Toroker [R. T. 190-196]. Outside the house, the Agents recovered the heroin which is the subject of Count Twelve and the cocaine which is the subject of Count Thirteen of the Indictment [R. T. 200].

Following his arrest, Appellant Rice indicated that he wished

to cooperate with the Government and advised the Agents that he was expecting a call from his "source of supply". He gave permission to the Agents to monitor this telephone call [R. T. 271-272]. Thereafter, a telephone call was received from Appellant Eddie Javor. Rice stated "is this Eddie"? Javor replied "yea, is everything alright?" Rice stated "it's okay, but the people want the rest of the heroin". Javor said "Do you have the money for the 10 ounces?" Rice stated "yes, I have the money". Javor then advised that he would be over in about an hour to pick up the money and discuss the balance of the stuff [R. T. 282-283].

At approximately 7 P. M. Appellant Javor drove into the residence; at which time he was arrested. From his wallet was removed Exhibit 13 which was the La Sierra Motel receipt for the June 5, 1965 weekend stay of Mr. and Mrs. Eddie Javor and John T. Dexter [R. T. 517-522].

IV

ARGUMENT

A. TRIAL COURT MADE A FULLY ADEQUATE DETERMINATION OF THE VOLUNTARINESS OF THE CONFESSION.

Appellants Rice and Toroker contend that they were deprived of a proper hearing to determine the voluntariness of their confessions prior to the submission thereof to the jury.

Jackson v. Denno, 378 U.S. 368 (1964) provides only that

the procedures utilized at the trial level must be " . . . fully adequate to insure a reliable and clearcut determination of the voluntariness of a confession, including the resolution of disputed facts upon which the voluntariness may depend." 378 U.S. 391.

In Sims v. Georgia, 385 U.S. 538,No. 251 (January 23, 1967) the court stated:

> " . . . a jury is not to hear of a confession unless and until the trial judge has determined that it was freely and voluntarily given. The rule allows the jury, if it so choose to give absolutely no weight to the confession in determining the guilt or innocence of a defendant, but it is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable quality."

There are two stages to the admission of a confession. The first being that the Court must satisfy itself preliminarily that the confession was voluntary, and the second being the defendant's right to ask the jury to pass upon question of voluntariness under proper instructions. Both facets of admissibility were complied with in the instant case. Appellants Rice and Toroker contended that involuntariness was premised on the fact that each was under the influence of LSD at the time of giving the confessions [R. T. 445].

When the issue was raised, the trial judge correctly defined the procedure when he stated, "the Court has to be convinced first of all that it is a voluntary confession or that the jury may reasonably consider it as a voluntary confession. Then it becomes a question for the jury to determine whether it is actually voluntary . . . are you willing to submit the question of its admissibility to the court on the basis of a confession, what it states, and upon the reports and what they state?" To which counsel replied "I think that is fair" [R. T. 447-448]. Thus in the instant case it was not only agreed that a hearing would be held, but Appellants by their own requests, set the scope of the hearing which was fully complied with by the District Court Judge.

After excusing the jury, the Court stated, "the record will show we are proceeding now in the absence of the jury for the purposes of determining whether or not the confessions of Mr. Rice and Mr. Toroker are admissible as voluntary." [R. T. 450-451].

After the hearing and at the beginning of the next trial day, the court determined that the confessions were admissible as voluntary. There resulted a discussion as to the manner of presenting the issue of voluntariness to the jury, and a suggestion was presented that the transcript of the hearing testimony be read to the jury. The court declined the suggestion and stated " . . . It first indicates to them that we have had a hearing outside of the jury, and the court has made this decision. Then they wonder, well, now, let's see, we want to decide the same way the Courts

decide." [R. T. 484-485]. As a result, the testimony was presented to the jury by the witness, and the court then properly instructed the jury regarding their duty [R. T. 514-515].

It is clear that the court in fact had a proper hearing and his conclusion of voluntariness appears from the record with unmistakable clarity. It is true that in instructing the jury on admissibility, the court stated he had made no decision, but had determined there was sufficient evidence to justify it being brought before the jury for determination. However, this instruction would merely seem to have given greater protection to the defendant's rights,for as the court noted, if he had advised the jury of the nature of his decision, this would have had in all probability been an improper comment on the evidence by persuading them to the court's point of view.

B. NO ERROR WAS COMMITTED BY GIVING THE INSTRUCTION ON ENTRAPMENT.

The second specified error alleges in substance that the trial court incorrectly charged the jury on the defense of entrapment.

At the trial Appellant Javor denied the commission of all offenses charged against him; Appellant Toroker denied the commission of the offenses charged against him in Counts One, Two, Five, Twelve and Thirteen [R. T. 672, 880, 681, 882-883, 720-721]; and Appellant Rice denied the commission of the offenses

charged against him in Counts One, Two, Three, Four, Twelve and Thirteen [R. T. 1048, 1050-1051, 1060-1061]. Where a defendant denies the commission of the crime, he is not entitled to the defense of entrapment, nor is he entitled to an instruction on entrapment.

Ortiz v. United States, 358 F. 2d 107 (9 Cir. 1966);

Ortega v. United States, 348 F. 2d 874 (9 Cir. 1965).

This alleged error challenges Appellant Toroker's conviction on only four of the nine counts for which he was convicted, and Appellant Rice's conviction on only five of the eleven counts for which he was convicted. Thus this claimed error should not be considered on appeal since Appellants Rice and Toroker were sentenced to five years on each count to run concurrently, and there are numerous counts which are unaffected by this alleged error.

Mathes v. United States, 334 F. 2d 653 (9 Cir. 1965);

Noah v. United States, 304 F. 2d 317 (9 Cir. 1962),

cert. denied 375 U. S. 855;

Redfield v. United States, 328 F. 2d 532

(C. A. D. C. 1964), cert. denied 377 U. S. 972.

Citing Notaro v. United States, 363 F. 2d 169 (9 Cir. 1966), appellants contend that the Federal Jury Practice and Instructions, Mathes and Devitt, Section 10. 12, Instruction on Entrapment, is erroneous. However, contrary to thefacts of Notaro, appellants in the instant case, specifically requested the entrapment instruction and expressed their satisfaction with "the suggested ones in Judge

Mathes' book" [R. T. 859-860]. Under the circumstances, the failure to give a Notaro type instruction was not error.

Robinson v. United States, ___ F. 2d ___

(No. 20, 752, May 18, 1967, 9 Cir.).

Lastly, appellants contend that even if the form instruction was proper, the contents of the instruction as given was improper. In this regard appellant's failure to object forecloses the right to review. Recognizing all too clearly the possibility of human error in either the trial court's delivery of instruction or even the reporter's recording of instructions, Rule 30 of the Federal Rules of Criminal Procedure provides in part:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects there to before the jury retires to consider its verdict. . . ."

In the instant case, appellants did not object to the instructions as given [R. T. 1449].

Phillips v. United States, 334 F. 2d 589 (9 Cir. 1964), cert. denied 379 U. S. 1002.

C. EVIDENCE DISCLOSING ANOTHER OFFENSE WHICH IS INTERMINGLED WITH THE CRIME CHARGED IS ADMISSIBLE.

A person convicted of a violation of certain marihuana laws is required to register with Customs upon departure and return into the United States. Failure to do so, is a violation of Title 18, U.S.C. Section 1407.

Appellant Javor alleges it was prejudicial error for the Government to elicit on cross-examination that Appellant Javor, who was both subject to and aware of this requirement, deliberately chose not to register when he went to Tijuana on the weekend of June 5, 1965 [R.T. 1222-1223, 1228]. Such evidence was admissible to prove his knowledge of transporting heroin on that occasion and his lack of innocent purpose for the trip to Tijuana.

Reed v. United States, 364 F.2d 630 (9 Cir. 1966).

Additionally, as the evidence clearly establishes, Appellant Javor was the "source of supply" who made this specific trip to Tijuana to illegally import the narcotics for which he was charged in Counts Ten and Eleven.

The general rule that evidence of a separate offense is inadmissible,

> " . . . does not apply where the evidence of the other offense directly tends to prove the crime charged in the Indictment, or when a complete account of the offense charged and the defendant's

connection therewith cannot be given, without disclosing the particulars of such other acts, or when it is so connected and intermingled with the crime charged as to form one entire transaction, and proof of one involves proof of the other."

Johnston v. United States, 22 F. 2d 1, 5 (9 Cir. 1927), cert. denied 276 U.S. 637;

United States v. Levine, 372 F. 2d 70 (9 Cir. 1967);

Theobald v. United States, 371 F. 2d 769 (9 Cir. 1967);

Stewart v. United States, 311 F. 2d 109 (9 Cir. 1962);

United States v. Phillips, 375 F. 2d 75 (7 Cir. 1967).

D. CROSS-EXAMINATION USE OF CONFESSIONS TO CHALLENGE CREDIBILITY WAS PROPER.

Following their arrest on June 7, 1965, Appellants Rice and Toroker separately gave written signed confessions. As the trial judge noted, the confessions were competent evidence; however, he did not have to decide if relevancy was outweighed by any possible prejudice to Appellant Javor who was identified as the "source of supply" in both confessions, since the jury was advised that Appellants Rice and Toroker stipulated that they had admitted the offenses charged in the Indictment [R. T. 514, 904].

In addition to contradicting other facts described in their confessions, Appellants Rice and Toroker testified that their

association with Eddie Javor only concerned household repairs. Appellant Toroker testified that he had seen Mr. Javor once in May and once in June regarding some resurfacing and upholstery work [R. T. 869-872]. Mr. Rice testified that his meetings with Mr. Javor only concerned building a roof on the recreation room, upholstery work and other household repairs [R. T. 1075-1077, 1113-1115]. Mr. Toroker testified that Michael DeCristo's supplier, Nick, had furnished the narcotics described in Counts Ten and Eleven [R. T. 710]. Mr. Rice testified that Appellant Javor did not supply any heroin [R. T. 1124]. Mr. Rice testified that after his arrest on June 7, 1965, Mr. Javor telephoned and the conversation was "This is Eddie Javor . . . is it all right to come up?", to which Mr. Rice replied "Come on up." [R. T. 1119-1120].

This testimony does not concern collateral matters. It is the crux of Counts Ten and Eleven of the Indictment, wherein each appellant is charged with the concealment, transportation and sale on June 7, 1965 of 237.345 grams of heroin.

The written confessions were admissible in the Government's case-in-chief, with proper limiting instructions, even though they contained the name of an absent non-declarant defendant.

Delli Paoli v. United States, 352 U.S. 232 (1957);

Marroso v. United States, 331 F. 2d 601 (5 Cir. 1964), cert. denied 379 U.S. 899;

United States v. Aviles, 274 F. 2d 179 (2 Cir. 1960), cert. denied 362 U.S. 974, 982;

United States v. Bando, 244 F. 2d 833 (2 Cir. 1957),

cert. denied 335 U.S. 844.

United States v. Gordon, 253 F.2d 177 (7 Cir. 1958), reversed on other grounds 344 U.S. 414, is inapplicable since the defendant's statement admitted therein related only the guilt of a non-declarant co-defendant, and in fact were exculpatory statements as to the declarant defendant.

The cross-examination use of these confessions is vitally important after the Appellants Rice and Toroker voluntarily took the stand to not only deny the charges against themselves, but to affirmatively defend Appellant Javor in the crimes of which he was charged. To prohibit the cross-examination use of these confessions is to place a premium on perjury.

Bailey v. United States, 328 F.2d 542 (D.C. Cir. 1964), cert. denied 377 U.S. 972.

Further, if Appellant Javor thought he might be prejudiced by a co-defendant's confession, which implicated him, he should have requested a severance of defendants pursuant to Rule 14 of the Federal Rules of Criminal Procedure. Failure to request a severance should be deemed a waiver of this alleged error.

It should be noted that during the cross-examination of Appellants Rice and Toroker, and again during instructions, the trial court admonished the jury on numerous occasions that any reference to Eddie Javor was not to be considered as evidence against Eddie Javor, but solely for the purpose of impeachment of Appellants Rice and Toroker [R.T. 946-947, 1421-1422].

Appellant Javor contends that the cross-examination of

Lawrence Toroker was error for an additional reason. Counsel for Appellant Toroker offered to stipulate that he had impeached himself [R. T. 912]. Whether or not the Government is bound to accept a counsel's stipulation to the effect that his client has committed perjury, in lieu of questioning the defendant's credibility by cross-examination, is an apparently undecided legal issue. However, it is clear that the Government should not be forced to accept a stipulation. To have accepted this unique stipulation would merely result in a different allegation of error for appellate review.

E. APPELLANTS STIPULATED TO NARCOTIC CONTENT.

Appellants contend that the judgment must be reversed for failure to prove the narcotic character of the substances involved.

During the testimony of the Government chemist, defense counsel interrupted in the interest of saving time and offered to stipulate to the narcotic content and chain of custody as to the exhibits relating to each count of the Indictment. The record then discloses:

> "MRS. DUNNE: If I may take the time to mark each one of them, I will then offer the matters concerning what the substance is, is that agreeable, counsel, as to each of the defendants?" [R. T. 77].

To which each appellant agreed. Thereafter the jury was orally advised as to the weight and narcotic content of each exhibit.

Government counsel then inquired: "Does this correctly constitute the stipulation as I have phrased it?" [R. T. 78-79]. Although the record does not disclose an explicit answer, it is clear from this coloquy that the stipulation was agreed to.

A stipulation is an agreement between counsel and it is essential that the parties or their counsel assent to the terms thereof. However, this requisite assent to a stipulation need not be made in a formal manner. It may be implied from the conduct of counsel. Acquiescence by silence may constitute an assent to stipulate.

McBain v. Santa Clara Savings, 51 Cal. Rptr. 78 (1966).

Appellants should not now be allowed to repudiate the obligation of their own agreement to the stipulation which they initiated merely because explicit words of consent are omitted from the transcript.

Contrary to the decision in Cook v. United States, 362 F. 2d 548 (9 Cir. 1966), wherein the Government made no attempt to prove the narcotic character of the drugs, in the instant case there was a stipulation, and also the agents specifically testified that the substances described in Counts One, Two, Ten and Eleven were subjected to a Marquis Reagent test, which is a field test utilized to determine the presence of an opiate and the substances did produce a positive reaction indicative of an opiate [R. T. 101, 192-193].

F. THE EVIDENCE PROVED THAT EDDIE JAVOR HAD POSSESSION OF THE HEROIN DESCRIBED IN COUNTS TEN AND ELEVEN.

Appellant Javor challenges the sufficiency of the evidence of his possession of the narcotics described in Counts Ten and Eleven of the Indictment. He contends that since there was no proof of possession, it was error to give an instruction on aiding and abetting.

The facts as previously stated establish that Eddie Javor was the supplier of the heroin. He had actual physical possession when he gave the narcotics to Mr. Cagle in Tijuana. He illegally imported the narcotics by transporting it from Tijuana to Los Angeles. The telephone conversation wherein Eddie Javor asked if the money had been received for the 10 ounces of heroin shows clearly that he had joint constructive possession of the heroin when it was sold to the Agents on June 7, 1965.

In David A. Hill v. United States, ___ F. 2d ___, No. 21,126 (9 Cir., May 5, 1967), this Court held that it is improper to give an instruction in regard to aiding and abetting unless there is proof that the defendant knew the narcotics had been unlawfully imported or that the defendant had actual or constructive possession. In the instant case, there was proof of both factors, therefore, the instruction was proper.

G. THE JURY INSTRUCTIONS ON WITNESS CREDIBILITY WAS NOT ERROR.

Appellants contend that instructing the jury that a witness is "presumed to tell the truth 'rather than' assumed to tell the truth" is error since it required the jury to believe the Government Agents and to presume guilt after the testimony of the first Government witness.

This point is without merit. In addition to presenting defense witnesses, each appellant testified in his own defense. The net result being that appellants are in the same position as if the trial judge had used the word assume rather than presume.

H. THE TRIAL COURT PROPERLY RESTRICTED EXAMINATION.

It is urged that the Court erroneously curtailed questioning of a defense witness as to whether or not the Government witness Mr. Cagle had been released on his own recognizance after he had testified. Contrary to appellants' contention, the most critical evidence against Mr. Javor was not Mr. Cagle but rather Mr. Javor's own words when he asked during a telephone conversation about the sale of the 10 ounces of heroin.

Initially, it should be noted that there was an in depth questioning of the witness, Mr. Paullus concerning any promises made to Mr. Cagle and specifically any promises relative to his

release from custody. Mr. Paullus denied such promises. The defense asked if it were not a fact that Mr. Cagle was at liberty. Objections were sustained. A party may not cross-examine his own witness in an effort to impeach him.

Bushaw v. United States, 353 F. 2d 477 (9 Cir. 1965), cert. denied 384 U. S. 921.

Regardless of whether the defense had the right to cross-examine their witness, the Court has considerable discretion as to the permissible extent of examination.

Harris v. United States, 371 F. 2d 365 (9 Cir. 1967); Enciso v. United States, 370 F. 2d 749 (9 Cir. 1967).

The record discloses an extensive examination into the motive for Mr. Cagle's testimony. There was no restriction whatsoever on any questioning regarding promises of leniency or any other expectation of Mr. Cagle. In the absence of any promise, Mr. Cagle's release subsequent to testifying is within the realm of speculative materiality. As the trial judge in the instant case pointed out, if in fact Mr. Cagle was released on his own recognizance after his testimony, it was a Court Order which could have been initiated by any one of many people and one can only assume that the Court did it upon a legal, legitimate reason [R. T. 1153].

Bomar v. United States , 270 F. 2d 329 (D. C. Cir. 1959), cert. denied 361 U. S. 936.

I. THE TRIAL COURT DID NOT UNDULY LIMIT PROOF OF LSD CONSUMPTION.

Appellants Rice and Toroker testified in great detail to their use of LSD and specifically that they had used LSD on the dates of each transaction described in the indictment. Mary Lou Rice testified to the same general effect [R. T. 597]. In addition, the defense called Stephen Cole who testified that he saw Appellants Rice and Toroker take LSD during this period of time. However, Mr. Cole could not testify that either appellant used LSD on an indictment date or even that he saw the appellant on a day described in the indictment [R. T. 552-574]. The next defense witness, Linda Quante, was also offered to show prolonged usage of the drug and the defense volunteered to avoid any cumulative testimony [R. T. 577-578]. As to the third witness, Regina Champlain, the defense advised the court, "Your Honor, we had the same questions to ask of her, but she would also give cumulative answers, so we will refrain from asking the questions concerning the LSD and the use of it." [R. T. 591]. On redirect, the defense asked about the use of LSD by Appellants Rice and Toroker and an objection was sustained [R. T. 596].

The Government did not contest the fact that Appellants Rice and Toroker used LSD. Appellant Toroker was under the effect of LSD when his psychiatrist examined him. The psychiatrist testified he was sane at that time [R. T. 804]. This drug usage was relevant to the defense of insanity if appellants were under the influence of

LSD on the date and at the time of the offenses charged [R. T. 799]. The three witnesses aforedescribed could not testify to this fact thus, it was proper to sustain the objection to the question posed to Miss Champlain.

> "In the exercise of a sound judicial discretion, a Court may limit the number of witnesses permitted to testify to a single fact and the extent to which cumulative testimony may be received. It may be that in some instances particularly where a fact is not contested, a limitation to one witness is proper."
>
> Peterson v. United States, 268 F. 2d 87, 88 (10 Cir. 1959).

J. THE JURY WAS PROPERLY INSTRUCTED ON INSANITY.

Appellants specifically requested the instructions on insanity which were given by the Court below [R. T. 860]. After the instructions were read to the jury, appellants did not object to the insanity instructions [R. T. 1449].

Rule 30 of the Federal Rules of Criminal Procedure provides in part that "no party may assign as error any portion of the charge or admission therefrom unless he objects thereto before the jury retires to consider the verdict. . . ". Appellants' failure to object has foreclosed the right to review.

Phillips v. United States, 334 F. 2d 589 (9 Cir. 1964),

cert. denied 379 U.S. 1002.

Credibility was determinative of the issue of insanity in the instant case. Thus the given instruction was proper.

Kilpatrick v. United States, 372 F.2d 93 (9 Cir. 1967);

Maxwell v. United States, 368 F.2d 735 (9 Cir. 1966);

Sauer v. United States, 241 F.2d 640 (9 Cir. 1957), cert. denied 354 U.S. 940.

V

CONCLUSION

It is respectfully submitted that for the reasons stated, Judgments of Conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

JO ANN DUNNE,
Assistant U. S. Attorney,
Chief, Fraud Section,
Criminal Division,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ JO ANN DUNNE

JO ANN DUNNE,
Assistant U. S. Attorney,
Chief, Fraud Section,
Criminal Division.